

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (IDEA)

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**State-Level Complaint 2020:505  
Denver Public Schools**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on January 27, 2020 by the parent (Parent) of a student (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

Based on the written Complaint, the SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from January 27, 2019 through January 27, 2020 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Whether Denver Public Schools (District) violated the IDEA and denied Student a free appropriate public education (FAPE) by:

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

1. Determining Student's continued educational placement in an affective needs (AN) program in November 2019 based on evaluations and data that do not support such a placement decision, consistent with 34 C.F.R. §§ 300.304, 300.305, and 300.116;
2. Failing to educate Student in the Least Restrictive Environment (LRE), consistent with his IEP, from May 2019 to the present by never instructing him in the general education setting, consistent with 34 C.F.R. §§ 300.114, 300.320(a)(5).

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>3</sup> the SCO makes the following FINDINGS:

#### **A. Background**

1. Student is an eight-year-old who is eligible for special education and related services under the disability category of Other Health Impairment (OHI). *Ex. C*, p. 54. Student is a second-grader at School, which is located within the District, where he participates in School's affective needs program (AN program). *Id.*
2. Student is a creative and social child, who enjoys hands-on activities, video games, and the skate park. *Id.* at 56. Student possesses strong auditory processing, oral expression, vocabulary, and gross motor skills. *Id.* District staff describe Student as intelligent and extremely motivated to succeed. *Interviews with School Psychologist, General Education Teacher, and AN Teacher.*
3. Historically, Student has exhibited extreme behavioral difficulties which have impeded his ability to access academic instruction and disrupted the learning environment. These behaviors include physical aggression toward classmates and staff, yelling, profanity, throwing objects, work refusal, and elopement. *Ex. J*, pp. 6-8.
4. Parent and District agree on the amount and type of services necessary for Student to receive FAPE, but have long disagreed on placement. *Response*, p. 4. Parent's position is that Student should spend the majority of his school day in the general education classroom and receive all supports and services there. District's position is that Student's needs necessitate a more restrictive placement at the AN program.
5. Specifically, Parent alleges that current evaluation data do not support Student's continued placement in the AN program. *Complaint*, p. 3. Parent also alleges that District has not educated Student in the least restrictive environment (LRE) as defined in his IEP because it failed to include him in the general education environment. *Id.*

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

## **B. CDE State-Level Complaint 2019:501**

6. Relevant to both allegations here, Student's educational programming was the subject of state-level complaint 2019:501. *Ex. J*, pp. 3-28. There, based on the results of a fall 2018 evaluation, the IEP team determined that Student required intense academic and behavioral supports in a small group setting, and set Student's placement in the LRE at less than forty percent in general education. *Id.* at 11-16. In December 2018, the IEP team proposed placing Student at the AN program, but Parent objected and Student remained at Former School. *Id.* at 15. Parent then filed a state-level complaint on January 3, 2019 alleging that the evaluation did not support a restrictive placement.
7. The investigating SCO concluded that the District conducted a comprehensive evaluation, properly determined Student's LRE, and described Student's placement "in a small-group setting for specialized instruction with limited distractions, while at the same time affording exposure to peers in general education during recess, lunch, and specials, in order to support his substantial behavior, academic, and social-emotional needs." *Id.* at 22. However, while the District recommended placement at the AN program in December 2018, it failed to formally make a specific offer of placement. The investigating SCO ordered the District to reconvene the IEP team to make a firm offer of placement consistent with the IEP team's decision. *Id.* at 26-27.
8. The District convened the IEP team on April 19, 2019, and amended the IEP's service delivery statement to state that Student would receive specialized instructional services through the AN program. *Ex. C*, pp. 44-45. All other aspects of Student's IEP remained unchanged, including the amount of direct service minutes in academic and social emotional instruction, accommodations, modifications, annual goals, and LRE.
9. Again, the IEP defines Student's LRE as less than forty percent of the time in general education. Specifically, the IEP provides for Student to participate in lunch, recess, and specials with general education peers, and to otherwise receive all academic and social emotional instruction in the AN program. *Id.* at 15.

## **C. School's AN Program**

10. In May 2019, during first grade, Student started attending School's AN program. *Complaint*, p. 3. In August 2019, he returned to the AN program as a second-grader.
11. The AN program provides specialized instruction in a small group setting with similarly situated peers for students whose behavioral and social emotional issues impede their ability to participate in general education. The AN program is highly structured with predictable routines, fewer transitions, and more environmental control designed to minimize distractions. Additionally, the AN program is staffed by providers with specialized training to support students with significant social emotional needs. These staff provide frequent positive reinforcement and daily social emotional learning. The

goal of the AN program is to provide these supports in order to address behavior and help students transition back into the general education classroom. *Ex. C*, p. 45; *Interviews with AN Teacher and School Psychologist*.

12. The first week of the 2019-20 school year, Student exhibited the same behavior described at FF #3. However, starting the second week of the school year, Student's behavior improved and he no longer engaged in frequent aggressive outbursts. *Interviews with AN Teacher and School Psychologist*. Aside from the first week of the school year—where behavior prohibited Student from safely participating within general education—Student has routinely attended lunch, recess, and specials with his general education peers consistent with his IEP. *Interview with AN Teacher*.
13. On September 25, 2019, based on a disagreement with Student's placement in the AN program, Parent requested to revoke consent for special education and related services. *Ex. E*, p. 4. However, Parent then agreed to withdraw her request and instead consented to a reevaluation, which was completed on November 8, 2019.

#### **D. The November 2019 Reevaluation**

14. District reevaluated Student in November 2019. *Ex. D*, pp. 40-58. The reevaluation consisted of: a review of academic and health records; completion of updated academic assessments; a review of behavior point sheet data; a review of the fall 2018 evaluation; an interview with Parent; classroom and peer comparison observations; and a health assessment. The SCO now turns to the reevaluation results that are relevant to the IEP team's decision to place Student at the AN program.
15. As part of the updated academic assessments included in the reevaluation, AN Teacher administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) on November 4. *Ex. D*, p. 42. The WIAT-III is a test of academic achievement that includes sixteen subtests measuring listening, speaking, reading, writing, and math skills. The results show that while listening comprehension and oral expression were strengths, the "early reading skills, word reading, pseudo word reading, reading comprehension, and oral reading fluency subtests were notable weaknesses for [Student]." This assessment put Student's overall academic ability in the low range. *Id.* at 58.
16. AN Teacher also administered the Comprehensive Test of Phonological Processing – 2nd edition (CTOPP-2), a comprehensive instrument designed to assess reading ability by measuring phonological awareness, phonological memory, and rapid naming. *Id.* at 41. Student's composite scores on this assessment fell in the very poor range. *Id.* at 58.
17. Nevertheless, Student is making academic progress in the AN program. For example, Student only knew 11 uppercase and lowercase letters at the start of the school year but now knows the complete alphabet. He is now also able to write his first and last name. *Interview with AN Teacher*. His spelling and pronunciation are improved, and he

is building necessary skills to become an independent reader and writer. *Id.* Parent agrees that Student has made academic progress, and attributes this improvement to the high level of individual support Student receives in the AN program. *Interview with Parent.*

18. The reevaluation also examined Student's behavioral and social emotional functioning. AN Teacher and Parent both completed the Conners 3 questionnaire to assess behavioral functioning. The Conners 3 assesses Attention Deficit/Hyperactivity Disorder (ADHD) in children and adolescents 6 to 18 years old. *Ex. D*, p. 47. Results of this assessment show learning problems in the "very elevated" range based on AN Teacher and Parent ratings. Hyperactivity/Impulsivity was shown to be in the "very elevated" range based on AN Teacher's rating, and in the "elevated" range from Parent. *Id.* at 48.
19. Parent and AN Teacher also completed the Behavior Assessment System for Children-Third Edition (BASC-3). The BASC-3 assesses overall social emotional adjustment, and is used to help determine how social emotional functioning affects academic progress. *Id.* at 48. Based on AN Teacher's ratings, aggression, conduct problems, and learning problems fell in the "clinically significant" range, while anxiety, depression, atypicality, adaptability, leadership, study skills, and functional communication fell in the "at-risk" range. Parent's ratings did not classify Student as "clinically significant" or "at-risk" on any of the domains. *Id.* at 48-49. School Psychologist observed that while Student's BASC-III scores are improved compared to previous years, they remain in the "clinically significant" range and "at-risk" range. *Interview with School Psychologist.*
20. School Psychologist conducted three structured observations of Student, first in the AN classroom on October 30, then twice in the general education classroom on November 5 and 6. At times Student needed to be redirected in both environments, but he mostly displayed appropriate behavior and was not disruptive. However, in the general education classroom, Student needed constant redirection to stay on task, or he would become distracted and fail to participate in class. *Ex. D*, p. 53. School Psychologist cautioned that, since Student did not regularly attend the general education class at that time, he was unfamiliar with the routines and expectations of that environment. *Id.*
21. Instructional Specialist conducted four peer comparison observations in November 2019 in the AN classroom, the general education classroom, and at recess. *Id.* at 54. Instructional Specialist has known Student since kindergarten, and indicated that the observations were notable for "appropriate and on-task work behaviors." This included appropriately pushing a peer on a swing at recess without becoming aggressive or violent. Instructional Specialist, like School Psychologist, noted that Student struggled to navigate the expectations of the general education classroom. *Id.*; *Interview with Instructional Specialist.*

22. School Psychologist provides social-emotional lessons twice a week to Student in the AN classroom, and the IEP team considered related observations alongside reevaluation data. During lessons in August, Student became dysregulated and could not participate. In September, Student had calmed, but was still not interested in participating. However, in October, Student began “enthusiastically and actively participating in the lessons, staying on task, and following directions.” Still, there were times when Student became dysregulated by “talking back to an adult, refusing to comply, telling on what his peers are doing, and being disruptive.” *Ex. D*, pp. 53-54.
23. Finally, AN Teacher summarized Student’s daily behavior point sheets as part of the reevaluation. *Id.* at 44. Student met his behavioral goal regarding “safe hands and feet.” *Id.* Aside from the first week of school, Student no longer hits classmates and staff, or destroys property. *Interview with AN Teacher*. Student also showed progress on his goal related to using calming skills. *Ex. D*, p. 44; *Interview with AN Teacher*.
24. However, Student did not meet behavioral goals regarding following directions, staying on task, or using kind and friendly language. *Ex. D*, p. 58. Student continues to disrupt the learning environment, and struggles with conflict resolution and the ability to cooperate with his teachers and service providers, often becoming defensive and argumentative. Additionally, Student displays marked difficulties building positive relationships with his peers. He exhibits controlling and hurtful behavior toward peers, such as mocking classmates when they make mistakes. *Interview with AN Teacher*.
25. Overall, since entering the AN program, Student has made progress behaviorally. School Psychologist noted that Student’s progress is likely attributable to the intensive supports and highly structured nature of the AN program. *Ex. D*, p. 54. AN Teacher concurred that the AN program has helped Student decrease the magnitude and frequency of his behavioral outbursts. *Interview with AN Teacher*.
26. However, School Psychologist and AN Teacher both agree that Student still faces significant behavioral and social emotional issues, such as refusing to follow directions, talking back to adults, acting impulsively, disrupting peers, and verbal outbursts. Based on these continued issues, School Psychologist noted that “social and emotional factors continue to interfere with [Student’s] learning and social functioning in school at this time.” *Ex. D*, p. 54.

#### **E. The November 11, 2019 IEP Meeting**

27. The IEP team convened on November 11, 2019 to review the reevaluation, discuss eligibility, and revise Student’s IEP. The IEP team concluded that Student’s disability affects “his ability to participate in appropriate activities and to show progress at the same rate as his peers.” *Ex. C*, p. 64. Results from academic assessments administered in the fall of 2019 further support this conclusion. For instance, Student’s scores on the

i-Ready math diagnostic assessment show he performs at a kindergarten level in all five core math areas. *Id.* at 59. Similarly, Student’s score on the Developmental Reading Assessment-2 (DRA2) indicates he reads at a beginning kindergarten level. *Id.* at 56. The IEP team also concluded Student’s delayed progress contributes to a “low frustration tolerance with academic tasks, which cause him to become defiant, argumentative/disruptive or to give up quickly.” *Id.* at 64.

28. The IEP team determined that Student requires a small group setting with a high frequency of positive feedback from adults to make progress. Additionally, though Student wants to develop positive relationships with classmates, the reevaluation showed that Student still frequently argued, corrected, and attempted to control his peers’ behavior, which impacted his ability to form healthy relationships. *Id.* The reevaluation also showed that Student continued to argue or become defiant with teachers, or refuse to work.

29. With respect to the AN program, and in consideration of reducing the amount of support outside of the general education, the IEP team noted that Student:

. . . made strong gains as a result of the highly structured and predictable routines within the AN classroom. He benefits from the behavioral interventions and intensive individualized reading, writing, and math interventions throughout his day. He enjoys being with peers in this smaller classroom setting and has begun to develop friendships. [Student] has made comments to providers that he enjoys being in the AN classroom and has written in his journal that he likes [School].

*Id.* at 75.

30. The IEP team determined that continued placement in the AN program was appropriate: “[Student] will receive individualized services . . . outside the general education classroom in a small group setting with similarly situated peers to provide an environment that is less distracting. Specialized instructional services will be provided in an Affective Needs center-based classroom . . . [t]his will allow him to receive targeted instruction based on his current academic levels.” *Id.* at 72.

31. The SCO finds that the IEP team determined Student’s needs were substantially similar to those needs identified through the evaluation in the fall of 2018, and that the IEP team decided Student’s continued educational placement in the AN program consistent with the results of both the evaluation and the reevaluation.

32. Parent objected to Student remaining in the AN program. *Id.* at 78. Notably, all IEP team members, including Parent, agreed with the amount and type of services listed in the IEP. *Id.* at 75. However, Parent asserted that the IEP could be implemented in the general education classroom. The IEP team discussed options for expanding Student’s time in general education, and decided to alter his schedule to include one hour per day in general education math and twenty minutes of social emotional lessons. *Id.* at 78. This increase did not change Student’s placement in the LRE. *Ex. E*, p. 10.
33. Accordingly, Student began attending math class in the general education classroom with supports from the AN program on December 11. The IEP team is collecting data to monitor Student’s social emotional and academic progress to determine both whether inclusion in general education has been successful and whether to increase his time in general education. *Ex. E*, pp. 10-11.

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

**Conclusion to Allegation No. 1: Current evaluations and data, including the November 2019 reevaluation, support Student’s continued placement in School’s AN program.**

Placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Andrew F. v. Douglas Cnty. School Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17).

For the reasons explained below, the SCO finds and concludes that Student’s placement was made by the IEP Team, and based on Student’s individualized needs and the IEP. First, placement in the AN program was based on the November 2019 reevaluation and other relevant data, demonstrating that placement was individualized to address Student’s disability-related needs.

Second, although Student’s behavior has improved since the first week of school, he continues to face significant behavioral and social emotional challenges. For example, Student met his “safe hands and feet” behavioral goal by not becoming physically violent and aggressive with staff and classmates. However, Student continues to disrupt the learning environment by defying and arguing with teachers and other adults, refusing to follow directions, and yelling in class. (FF #22, 24, 26). Based on these behaviors, Student did not meet his behavioral goals for following directions, staying on task, or using kind and friendly language.

This behavior data is consistent with Student’s ratings on the Conners 3, which place him in the “very elevated” range for learning problems and hyperactivity/impulsivity. Teacher ratings on the BASC-3, which assess overall social emotional adjustment, place Student in the “clinically



significant” or “at-risk” range across all domains. Additionally, though Student wants to build positive relationships with his peers, he continues to exhibit controlling and hurtful behavior toward his classmates.

Third, the IEP team determined, based on reevaluation, that Student required specialized instruction in a small group setting that is less distracting, in order to make academic progress. As noted at FF #15-16, there is broad consensus among the IEP team, supported by reliable assessments, that Student functions below grade level across all academic subjects. Student’s scores on the i-Ready math assessment and the DRA2 show he performs at a kindergarten level in math and reading. (FF #27). Additionally, Student’s WIAT-III score is in the low range in overall academic ability, and his CTOPP-2 score is in the very poor range for reading. (FF #15-16). Because Student currently needs a highly structured setting with frequent positive feedback, the IEP team determined that, based on Student’s needs and his IEP, the AN program was the most appropriate placement for Student to make academic progress. This determination is consistent with the IEP team’s placement decision in December 2018.

Finally, the credible evidence in the record shows Student has benefited from time in the AN program. As noted at FF #17, Student is making academic progress, as illustrated by his increasing writing and reading skills. Additionally, since the first week of school, Student has made commendable progress behaviorally, with a marked decrease in volatile and aggressive behavior toward teachers and classmates. (FF #23, 25). As noted at FF #29, the IEP team recognized that Student benefited from the consistent behavioral and academic interventions the AN program is able to provide. However, both AN Teacher and School Psychologist agree that, in terms of behavioral and social emotional issues, Student still faces significant challenges that interfere with his academic and social functioning. Accordingly, the SCO finds and concludes that current evaluations and data, in tandem with Student’s academic and behavioral progress, indicate that the AN program is an appropriate placement for him at this time.

**Conclusion to Allegation No. 2: The District properly educated Student in the LRE defined in his IEP by ensuring he attended lunch, recess, and specials with general education peers.**

The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate. 34 C.F.R. §§ 300.114 and 300.116. Accordingly, an IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in the IEP. *Id.*

In this case, when Student started to attend School in May 2019, the IEP’s LRE section placed him in the general education classroom less than 40 percent of the time. Per the IEP, Student only participated in general education during lunch, recess, and specials. Besides the first week of the 2019-20 school year, where Student’s extreme behavior prevented him from attending

lunch, recess, and specials with his general education peers, he consistently participated in general education during those times.

Following the November 2019 reevaluation, the IEP team maintained Student's LRE at less than 40 percent in general education, with inclusion during lunch, recess, and specials. At Parent's urging, and consistent with the goals of the AN program, Student's time in general education began to increase in December 2019. Since December 2019, Student has attended math class and social emotional instruction with supports in the general education classroom. This change did not alter the IEP's LRE provision. The credible evidence in the record supports the conclusion that Student has consistently participated in general education according to his IEP since he transferred to School in May 2019, and the SCO accordingly finds no violation.

### **REMEDIES**

The SCO finds and concludes that the District did not violate any requirements of the IDEA. Accordingly, there are no remedies ordered pursuant to the IDEA and my authority as an SCO.

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 26 day of March, 2020.

/s/ Thomas Treinen

Thomas Treinen

State Complaints Officer

## **Appendix**

### **Complaint, pages 1-4**

#### **Response, pages 1-10**

- Exhibit A: District policies and procedures
- Exhibit B: District policies and procedures
- Exhibit C: IEP 5/14/18; IEP 12/18/18; IEP amendment 3/19/19; IEP 11/11/19
- Exhibit D: Evaluation report 12/18/18; evaluation report 11/8/19
- Exhibit E: PWN 9/29/19; PWN 8/13/19; PWN 4/9/19; PWN 12/16/19
- Exhibit F: Notice of meeting 3/14/19; notice of meeting 10/23/19
- Exhibit G: 2018-19 report card; IEP progress report 11/11/19; 2019-20 report card
- Exhibit H: Email correspondence
- Exhibit I: District employee list
- Exhibit J: SC 2019:501; Student schedule 8/19/19-12/11/19 and 12/12/19-present

#### **Reply, pages 1-7**

- Exhibit 1: Evaluation report 2017
- Exhibit 2: no exhibit 2 submitted
- Exhibit 3: Evaluation report 11/8/19
- Exhibit 4: Email correspondence
- Exhibit 5: Private provider contact information
- Exhibit 6: IEP 12/19/17
- Exhibit 7: PWN 4/29/18
- Exhibit 8: District “golden thread” checklist

#### **Interviews with:**

Parent  
School Psychologist  
General Education Teacher  
Special Education Manager  
Instructional Specialist  
AN Teacher